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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HUSSMANN CORPORATION,
Petitioner,

vs.

ROSETTA COOK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Is a union employee's state-law claim for workers' compensation retaliatory discharge "independent" of the governing collective bargaining agreement and therefore not preempted by §301 of the Labor-Management Relations Act even though the employer's defense is that the employee was discharged for violating specific provisions in the labor agreement?

2. Do state-law claims for retaliatory discharge constitute a special "exception to the reach of federal preemption" as held by the Supreme Court of Missouri below?

3. If a right granted to a union employee by state law is not preempted, can the right nonetheless be waived by provisions in the collective bargaining agreement?

LIST OF PARTIES

Petitioner before this Court is Hussmann Corporation (hereinafter "Hussmann"), a Missouri corporation. Hussmann is a wholly owned subsidiary of Whitman Corp., a Delaware corporation. Respondent Rosetta Cook is an individual.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities Cited	v
Opinions Below	1
Jurisdiction	1
The Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
The Missouri Supreme Court Below Decided Important Federal Questions Concerning Preemption Under §301 of the Labor-Management Relations Act Which Have Not Been, But Should Be, Settled By This Court; The Court Below Also Decided Important Federal Questions In Conflict With Decisions of This Court, the Federal Courts of Appeals and Another State Court of Last Resort	8
A. The Questions Presented Are Important Both Because Of the Proliferation of Retaliation and Other State-Law Claims Asserted By Union Employees In the State and Federal Courts and Because Of the Need To Assure That the Preeminence Of the Collective Bargaining Scheme Of the Federal Labor Laws Is Maintained and Not Eroded	8

B. Subsequent To This Court's Seminal Decisions In *Lueck* (1985) and *Lingle* (1988) the Law Regarding §301 Preemption Has Become Increasingly Unsettled; A Further Decision By This Court Is Needed 11

C. The Case At Bar Presents Three Of the Most Recurrent Issues Regarding §301 Preemption and Is A Uniquely Appropriate Vehicle For This Court To Settle and To Resolve Conflicts and Give Guidance In This Troubled Area of Law 14

Conclusion 23

APPENDIX

Opinion of the Supreme Court of Missouri A-1

Opinion of the Missouri Court of Appeals, Eastern District A-7

Judgment of the Circuit Court of St. Louis County, Missouri A-16

TABLE OF AUTHORITIES CITED

Page(s)

Cases:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 6,10-13,16,17,19,21

Bettis v. Oscar Mayer Foods Corp., 878 F.2d 192 (7th Cir. 1989) 17,18

Catepillar Inc. v. Williams, 482 U.S. 386 (1987)..... 16,17

Clark v. Newport News Shipbuilding and Dry Dock Co., 937 F.2d 934 (4th Cir. 1991) 20,22

Commodore v. University Mechanical Contractors, Inc., 839 P.2d 314 (Wash. 1992) 14

Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989) 20

Eldridge v. Felec Services, Inc., 920 F.2d 1434 (9th Cir. 1990) 18

Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991)..... 13-14

Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988) 17

Harris v. Alumax Mill Products, Inc., 897 F.2d 400 (9th Cir.), cert. denied, 498 U.S. 835 (1990) 20

Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988), cert. denied, 490 U.S. 1107 (1989) 20

Jarvis v. Nobel/Sysco Food Services Co., 985 F.2d 1419 (10th Cir. 1993) 17,18,22

Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 14,20

Johnson v. Beatrice Foods Co., 921 F.2d 1015 (10th Cir. 1990) 20

Jones v. Roadway Express, Inc., 931 F.2d 1086 (5th Cir.), reh'g denied, 936 F.2d 789 (1991) 15,18

Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473 (6th Cir. 1990) 15,18

Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988)..... 20,22

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 6,7,9,12-18,21,22

Marshall v. TRW, Inc., 900 F.2d 1517 (10th Cir. 1990)..... 17-19

McCormick v. AT&T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 912 (1992) 19,20,22

Medrano v. Excel Corp., 985 F.2d 230 (5th Cir. 1993)..... 22

Mock v. T.G.& Y. Stores Co., 971 F.2d 522 (10th Cir. 1992)..... 14,22

Nash v. AT&T Nassau Metals, 381 S.E.2d 206 (S.C. 1989).....15,16,20

Nelson v. Central Illinois Light Co., 878 F.2d 198 (7th Cir. 1989) 15-17

Newberry v. Pacific Racing Assoc., 854 F.2d 1142 (9th Cir. 1988) 20

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 9-10,12

Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir.), cert. denied, 493 U.S. 992 (1989) 11,15,18

Sweeney v. Westvaco Co., 926 F.2d 29 (1st Cir.), cert. denied, __ U.S. __, 112 S.Ct. 274 (1991) 18

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 10,11

Wolfe v. Central Mine Equipment Co., 850 F.2d 469 (8th Cir. 1988) 15

Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987) 22

Constitutional Provisions and Statutes:

Article VI, United States Constitution 2

28 U.S.C. § 1257(a) 1

29 U.S.C. § 185(a), § 301 of the Labor-Management Relations Act 2,5,6,10,11,13,14,16,19-21

Section 287.780 R.S.Mo. (1986) 2,5,6

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Note, *Steering Away From the Arbutration Process: Recognizing State Law Tort Actions for Unionized Employees*, 24 U.Richmond L.Rev. 233 (1990) ... 8

Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U.Chi.L.Rev. 575 (1992) 8,9,11

White, *Section 301's Preemption of State Law Claims: A Model For Analysis*, 41 Ala.L.Rev. 377 (1990) 9-11,13,14,16,17,19

Zablotsky, *The Continuing Availability of Retaliatory Discharge and Other State Tort Causes of Action to Employees Covered by Collective Bargaining Agreements*, 56 Albany L.Rev. 371 (1992)..... 15

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HUSSMANN CORPORATION,
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ROSETTA COOK,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner Hussmann Corporation respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered April 20, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 852 S.W.2d 342 and is reprinted in the Appendix (A-1). The opinion of the Missouri Court of Appeals is unreported and is reprinted in the Appendix (A-7). The judgment of the Circuit Court of St. Louis County, Missouri is unreported and is reprinted in the Appendix (A-16).

JURISDICTION

The Supreme Court of Missouri entered its judgment on April 20, 1993. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Article VI, provides in pertinent part:

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Section 301(a) of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Missouri's Workers' Compensation Law, Chapter 287 of the Revised Statutes of Missouri, provides in section 287.780:

> **Discrimination because of exercising compensation rights prohibited — civil action for damages.** — No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

§287.780 R.S.Mo.(1986).

STATEMENT OF THE CASE

The Facts

Respondent Rosetta Cook was a union worker at petitioner Hussmann's manufacturing facility in St. Louis County, Missouri (L.F.[1] 35 & 70). When Cook was hired by Hussmann in 1987, she stated in her employment application that she had no back injuries or other serious pre-employment injuries (L.F. 36). Article 9 §4 ¶I of the governing collective bargaining agreement ("CBA") between Hussmann and the Steelworkers labor union (of which Cook was a member) specifically calls for termination of an employee who has falsified his or her employment application (L.F. 35 & 46-47).[2]

Several years later Cook twisted her ankle while working on the assembly line at Hussmann (L.F. 22). She filed a workers' compensation claim against Hussmann under Missouri's Workers' Compensation law, R.S.Mo. Ch. 287 (L.F. 22 & 70). Hussmann filed an answer to the claim admitting the ankle injury (L.F. 18 & 27).

At the same time she filed the claim against Hussmann, Cook also filed a workers' compensation claim against the State of Missouri's Second Injury Fund (L.F. 22; S.L.F. 1). The Second Injury Fund claim sought enhanced recovery (from the State) on the ground that Cook was also suffering lingering effects ("permanent partial disability") from various injuries she sustained prior to her employment with Hussmann (S.L.F. 1). The Second Injury Fund claim was asserted on a preprinted form on the backside of her claim against Hussmann (S.L.F. 1).

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[1] "L.F." refers to the Legal File below. "S.L.F." refers to the Supplemental Legal File.

[2] Article 9 §4 ¶I of the CBA provides that "the employee/employer relationship shall terminate if . . . [t]he employee falsifies or omits relevant information on his application for employment" (L.F. 46-47).

The pre-employment injuries described in Cook's Second Injury Fund claim were the same types of injuries Cook specifically denied having on her original application for employment (L.F. 35-36; S.L.F. 1). Eldon Williams of Hussmann's industrial relations department noticed the discrepancy and suspected a violation of Article 9 §4 ¶I of the CBA (L.F. 11, 14 & 19). He called Cook to his office to inquire about the apparently false statements in her original employment application (*id.*).[3]

Cook refused to answer Williams' questions. She stated it was "unethical" for him to inquire of her because she had a lawyer and that she would not discuss anything without a union representative present, and walked out of his office (per Cook's affidavit, L.F. 11). At the conclusion of a second meeting later that day in Williams' office, when she again refused to answer any questions, Cook was suspended pursuant to Article 8 §4 (L.F. 12-13; *see* preceding footnote).

A few days later, Williams explained to Cook's lawyer over the phone that "we want to talk to her about her original application" (per counsel's affidavit, L.F. 19). The next day Williams and another company official met with Cook and her union representative (L.F. 14).[4] Cook admits she was asked questions "regarding my original application for employment" (Cook's affidavit, L.F. 14). She further admits that "I told [Hussmann] I was not discussing the original application" (*id*). As before, Cook refused to answer any questions and walked out of the room (Cook's affidavit, L.F. 12 & 14).

On September 5, 1991 Hussmann notified Cook she was terminated (L.F. 15). Hussmann's stated reasons for terminating her were violations of Article 9 §4 ¶I of the CBA (falsification

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[3] Under Article 8 §4 Hussmann may investigate suspected violations of the CBA and suspend the employee "pending investigation" (L.F. 45).

[4] Article 6 §2 of the CBA provides that a union representative will be present in the meeting following an employee's suspension (L.F. 42).

or omission of relevant information on employment application), Plant Rule 1 (falsification of application or other company records),[5] and Plant Rule 20 (insubordination) (L.F. 35-36).

Cook did not file a grievance and did not invoke or exhaust the contractual grievance procedure (L.F. 36). The CBA contains a four-step grievance procedure, where the last step is "final and binding" arbitration (Article 7, L.F. 43-45). Under the CBA, a discharged employee may file a grievance claiming that his discharge was "unjust" or involved "unjustifiable Company action" (Article 8 §§4 & 5, L.F. 45-46). As noted, however, Cook never filed a grievance.

Procedural History

Instead of grieving under the CBA, Cook filed a lawsuit in the Circuit Court of St. Louis County, Missouri. Her one-count petition alleged she was discriminatorily discharged by Hussmann in violation of R.S.Mo. §287.780 (1986) for exercising her rights under Missouri's Workers' Compensation law (L.F. 70-73). The petition alleged she was discharged "particularly because she would not submit to private demeaning interrogation by Eldon Williams and others" (L.F. 72).

Hussmann filed a motion for summary judgment (L.F. 30-33). The motion contended that Cook's state-law claim was pre-empted by §301 of the Labor-Management Relations Act, 29 U.S.C. §185(a), and was barred by her failure to invoke or exhaust the grievance procedure under the CBA (*id*). Cook submitted an opposing affidavit stating *inter alia* that "I was terminated solely and only because I refused to be interrogated by Hussmann personnel" (L.F. 10).

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[5] Article 4 ¶J of the CBA states that Hussmann has the right "to create reasonable plant rules and compel their observance" (L.F. 41; *see also* Article 8 §1 [L.F. 45]).

The Circuit Court of St. Louis County sustained Hussmann's motion and entered judgment in favor of Hussmann (A-16). The judge found it to be "undisputed that plaintiff did not file a grievance in accordance with the collective bargaining agreement in existence at the time of the occurrence mentioned in the petition and the Court therefore concludes that defendant is entitled to judgment in its favor as a matter of law" (*id.*). On Cook's appeal, the Missouri Court of Appeals, Eastern District, reversed (A-7). The Supreme Court of Missouri, on Hussmann's petition, accepted transfer (review) of the case and thereby vacated the decision of the Court of Appeals (A-3).

On April 20, 1993, the Supreme Court of Missouri en banc, in a unanimous decision, reversed the summary judgment which had been entered in favor of Hussmann and remanded the case for trial (A-1). The opinion states at the outset:

> Section 287.780, R.S.Mo. 1986, protects employees from retaliatory discharge or discrimination brought about by the employees' exercise of rights granted by the Workers' Compensation Act, Chapter 287, R.S.Mo. We hold that neither federal nor Missouri law requires an employee to invoke or exhaust the grievance procedure in a collective bargaining agreement before filing suit under the statute.

A-1.

The opinion then proceeds to hold specifically that Cook's claim is not preempted by §301 of the Labor-Management Relations Act (A-5). The court acknowledged that under this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), §301 preempts any state-law claim whose resolution requires interpretation of provisions in a collective bargaining agreement (A-3 to 4). The Missouri court characterized this Court's later decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) — which held under rather unique

circumstances[6] that a union employee's workers' compensation retaliatory discharge claim was not preempted — as creating an "exception to the reach of federal preemption in workers' compensation cases" (A-4). Disregarding the specific CBA provisions Hussmann raised by way of defense as the basis for its actions, the court held that retaliation claims are by nature "independent" of the labor agreement and are therefore not preempted. In this regard, the court held, lifting language from *Lingle*, that whenever the "motivation of the employer" is an element of the state-law claim, the "motive" issue can always be "resolved without interpreting the agreement itself" (A-4, quoting from *Lingle*, 486 U.S. at 407 & 409-410). The Missouri high court further specifically held — reaching an issue expressly left open by this Court in *Lingle*, 486 U.S. at 409 n. 9 — that the provisions in Hussmann's CBA "cannot be deemed to be a *waiver*" of Cook's statutory right to bring this action (A-6, emphasis added).

Hussmann did not seek rehearing below and timely filed this Petition For a Writ of Certiorari.

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[6]*See* discussion below at pp. 12 - 13 .

REASONS FOR GRANTING THE WRIT

The Missouri Supreme Court Below Decided Important Federal Questions Concerning Preemption Under §301 of the Labor-Management Relations Act Which Have Not Been, But Should Be, Settled By This Court; The Court Below Also Decided Important Federal Questions In Conflict With Decisions of This Court, the Federal Courts of Appeals and Another State Court of Last Resort

A. The Questions Presented Are Important Both Because Of the Proliferation of Retaliation and Other State-Law Claims Asserted By Union Employees In the State and Federal Courts and Because Of the Need To Assure That the Preeminence Of the Collective Bargaining Scheme Of the Federal Labor Laws Is Maintained and Not Eroded

Twenty-two states now recognize a cause of action for workers' compensation retaliatory discharge.[7] Such claims are but one species of the broader class of claims for "wrongful discharge" or "unjust dismissal" which are now recognized by most states.[8] Employee lawsuits challenging their terminations are in

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[7] Compiled from *Individual Employment Rights Manual*, 9A Lab.Rel.Rptr.(BNA) 102 (index) & 540-92 (1991).

[8] Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U.Chi.L.Rev. 575, 591 (1992). Employee discharge claims come in many varieties, including wrongful discharge, retaliatory discharge, invasion of privacy (used in drug testing cases), intentional infliction of emotional distress, breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference with contract, slander, fraud and defamation. *See* Note, *Steering Away From the Arbitration Process: Recognizing State Law Tort Actions for Unionized Employees*, 24 U. Richmond L.Rev. 233, 242-3 (1990). Additionally, all states now recognize employment discrimination claims based on one or more of the following: race, sex, religion, national origin, age and disability. *See Fair Employment Practices Manual*, 8A Lab.Rel.Rptr.(BNA) 451:102-105 (1992).

derogation of the traditional common law "employment at will" doctrine and were relatively rare prior to the last decade. *See* Stone, *supra* note 8, at 591. In more recent years, however, the "at will" doctrine has been significantly eroded. The decades of the '80s and '90s have seen a virtual explosion in the number of wrongful discharge lawsuits. *See* White, *Section 301's Preemption of State Law Claims: A Model For Analysis*, 41 Ala.L.Rev. 377, 390 n. 57 (1990) ("wrongful discharge litigation [has been] *increasing geometrically*"); Stone, *supra*, at 591 (a "*nationwide trend*").

To the extent such lawsuits are brought by union members who have bypassed available contractual grievance/arbitration procedures,[9] and the suits are permitted to proceed, vital policies and interests of the collective bargaining scheme under federal labor law are jeopardized. "As a general rule," this Court has stressed, employees "must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis in original). The Court continued:

> . . . [U]nless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. *Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant.* LMRA §203(d), 29 U.S.C. §173(d); §201(c), 29 U.S.C. §171(c) (1958 ed.). Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance

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[9] "Nearly all" CBAs contain arbitration provisions. *Lingle*, 486 U.S. at 411 n. 11.

> the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> *A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.* In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters etc. v. Lucas-Flour Co.*, [82 S.Ct. 571, 577 (1962)].

Maddox, 379 U.S. at 652-3 (emphasis added); *accord Lueck*, 471 U.S. at 219-20. Contractual grievance/arbitration procedures play "the central role . . . in our 'system of industrial self-government.'" *Lueck*, 471 U.S. at 219, *quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). "[A] broad preemption doctrine" which prohibits circumvention of contractual remedies "best serves federal labor interests." White, *supra*, at 393.

The trend of the last decade runs directly contrary to these federal labor interests. Increasing numbers of state-law discharge claims brought by union employees have been allowed to proceed in the courts (state and federal) over §301 preemption objections, thereby posing "significant threats to the vitality of

federal labor principles embodied in collective bargaining." White, *supra*, at 434; *see also Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1339 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) (Kennedy, J., concurring in part & dissenting in part) ("The danger is clear."). In the view of one commentator, the federal labor scheme premised on "collective rights" is "collapsing" and is being replaced wholesale by a "regime" of state-law-created "individual rights." Stone, *supra*, at 575-6 & 593.

Given the "central role" played by grievance/arbitration procedures in the federal labor scheme, *Lueck*, 471 U.S. at 219, coupled with the recent increasing pressures on the state and lower federal courts to allow individual union employees to proceed with lawsuits against their employers, a special need exists, now more than ever, for an effective and clearly defined doctrine of §301 preemption.

B. Subsequent To This Court's Seminal Decisions In *Lueck* (1985) and *Lingle* (1988) the Law Regarding §301 Preemption Has Become Increasingly Unsettled; A Further Decision By This Court Is Needed

The Court in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) construed §301 of the Labor-Management Relations Act to preempt any state-court suit alleging breach of a collective bargaining agreement. In 1985 the Court recognized a broader reach of the preemption doctrine, holding that a union employee's state-law tort claim, even though not predicated on a breach of the CBA, is preempted by §301 (and therefore subject to dismissal) whenever "resolution of [the] state-law claim is substantially dependent upon analysis of the terms of [the CBA]." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220-21 (1985).[10] The preemption doctrine must reach that far, the Court concluded, in

[10] The Court held that Lueck's suit against his employer for bad faith handling of insurance benefits met the test and was therefore preempted. *Id.* at 221.

order to assure "interpretive uniformity and predictability" for labor agreements, to preserve the "central role of arbitration," and to foster the other federal labor interests listed in the above-quoted excerpt from *Maddox*. *Id.* at 210-20. The Court also stated that, given the inquiry required, preemption must be determined "on a case-by-case basis." *Id.* at 220.

Three years later, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Court addressed the further question whether a state-law claim (as here, for workers' compensation retaliatory discharge) should be preempted whenever the state court would need to engage in "*the same analysis of the facts*" as would a labor arbitrator deciding an unjust-discharge grievance under the CBA. *Id.* at 408 (emphasis in original). The Court refused to recognize such factual "parallelism" as an additional ground for §301 preemption. *Id.* Instead, the Court reaffirmed the test of *Lueck*, namely, that preemption occurs when resolution of the state-law claim requires "interpretation of" or is "substantially dependent on analysis of" provisions in a collective bargaining agreement. *Id.* at 410-13.

The *Lueck* test was not and could not be satisfied in the rather unique procedural context of *Lingle*. Lingle, unlike the typical union-employee plaintiff (who, like Cook, sues without ever invoking the contractual grievance/arbitration procedure), had diligently exhausted the CBA grievance procedure and obtained an arbitrator's award in her favor. *Id.* at 401-2. That award — which found that Norge lacked "proper" and "just" cause to terminate Lingle (*id.*) — was final and binding upon Norge. Norge, unlike Hussmann and the typical employer-defendant, was thus legally foreclosed in the subsequent lawsuit from raising any issues or defenses predicated on provisions in the CBA.

The prior arbitration award thus necessarily took the CBA out of play in Lingle's case. It was in this very unique context, then,

that the Court observed that Lingle's state-court action presented a "purely factual inquiry" — centered on the "motivation of the employer" — that "does not turn on the meaning of any provision of a collective-bargaining agreement." *Id.* at 407. Lingle's state-law claim was "independent" of the CBA "in the sense . . . that matters for §301 preemption purposes" and was thus not pre-empted. *Id.*

The procedural uniqueness of *Lingle*, which is crucial but subtle, has been completely overlooked by the state and lower federal courts.[11] They consequently have been confused by and have misinterpreted the opinion, usually to the detriment of the policies embodied in §301. Many courts (like the one below)[12] have conclusorily applied the result of *Lingle* (*i.e.*, non-preemption), parroting the Court's references to "purely factual inquiry," "motivation of the employer" and "independent," without realizing that in the typical case employer CBA defenses are *not* foreclosed by a prior arbitration award and that, unlike Norge in *Lingle*, such employers are fully entitled to invoke specific CBA provisions in support of their actions — the interpretation and application of which provisions should trigger preemption.[13] *Lingle*'s subtle uniqueness has thus inadvertently misled the lower courts and has made even muddier the waters of §301 preemption.

Notwithstanding *Lingle*'s clarion reaffirmation of the *Lueck* preemption test, *see Lingle*, 486 U.S. at 411 & 413, judicial confusion and conflict have significantly *increased* in the five years after *Lingle*. *See Galvez v. Kuhn*, 933 F.2d 773, 774 & 776 (9th Cir. 1991) (§301 preemption after *Lingle* is "one of the most

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[11] *See* White, *supra*, at 413 (*Lingle* was decided on its "particular facts, a point that seemingly has gone unnoticed by the lower courts").

[12] *See* discussion and cases cited in point C, *infra*.

[13] *See* White, *supra*, at 415 ("all too often" lower courts reject preemption "without regard to contract interpretation issues").

confused areas of federal court litigation," a "thicket," "tangled and confusing"); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1021 (10th Cir. 1990) ("circuits have reached varying [and] conflicting results" after *Lingle*); *Mock v. T.G.&Y. Stores Co.*, 971 F.2d 522, 530 n.8 (10th Cir. 1992)(same); *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d 314, 318 (Wash. 1992) ("*Lingle* . . . gives little guidance"; "courts are still struggling"; "§301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*"); White, *supra*, at 378, 385, 392 & 415 (*Lingle* has "increased the uncertainty in the lower courts"; courts are "sharply split"; §301 is "a rapidly increasing source of litigation in the state and federal courts"; *Lingle* has caused "conflicting results among and even within circuits and between the state and federal courts").

A further decision from this Court is needed to guide the lower courts and to put them back on track with respect to the all-important heavily-litigated issue of §301 preemption.

C. The Case At Bar Presents Three Of the Most Recurrent Issues Regarding §301 Preemption and Is A Uniquely Appropriate Vehicle For This Court To Settle and To Resolve Conflicts and Give Guidance In This Troubled Area of Law

The case at bar is an especially well-suited candidate for review. It presents three of the more vexing questions of §301 preemption, the answers to which will go a long way in clarifying this entire area of law. It also involves a state-court plaintiff who (unlike Lingle) completely bypassed the contractual grievance/arbitration procedure, thus presenting the most recurrent §301 scenario and the one most directly affecting the important federal labor policies embodied in §301 (*see* point A, *supra*). Finally, the state-law claim asserted here — workers' compensation retaliatory discharge — is identical to the one in *Lingle*. A finding of preemption by this Court in another workers' compensation retaliation case would be the most effective way to head

off the strong trend of the lower courts, typified by the decision below, to apply uncritically *Lingle*'s *result* (non-preemption) without ever coming to grips with the preemption test *Lingle* reaffirms.[14]

The Missouri Supreme Court below asserted that this Court in *Lingle* "recognized a limited exception to the reach of federal preemption in workers' compensation cases" (A-4). This notion that workers' compensation retaliation cases are *per se* "independent" of labor agreements and therefore not subject to preemption has gained nearly unanimous acceptance after *Lingle*.[15]

[14] In short, a finding of preemption in this case would mean that the *Lingle* decision could no longer be used by the lower courts as an expedient excuse to reject meritorious preemption objections.

[15] *Accord Nelson v. Central Illinois Light Co.*, 878 F.2d 198, 200, 202 (7th Cir. 1989) ("*Lingle* requires that [workers' compensation retaliation claims are] not subject to preemption"; such claims have a "state-law character" which "the defendant may not destroy" by injecting CBA issues); *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1482 (6th Cir. 1990) ("state law prohibiting retaliatory discharges creates rights independent of those created by a CBA"); *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1090 (5th Cir.) *reh'g denied*, 936 F.2d 789 (1991) ("the right to be free from retaliatory discharge for pursuing workers' compensation exists ... independently of the CBA"); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1331 (6th Cir. 1989) ("the state-law tort of retaliatory discharge creates rights independent of those established by the CBA and hence is not preempted"); *see also Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988) (where the court found no preemption simply because "*Lingle* applies with equal force to Missouri's workers' compensation *statute*" without inquiring into whether CBA provisions were implicated in the case); Zablotsky, *The Continuing Availability of Retaliatory Discharge and Other State Tort Causes of Action to Employees Covered by Collective Bargaining Agreements*, 56 Albany L.Rev. 371, 393-4 & 396-7 (1992) ("The Supreme Court has *unequivocally held* that *such claims* are not preempted"; the "*independent nature* of the cause of action" precludes preemption); *see also* additional cases cited in note 18 below.

The one case to the contrary is *Nash v. AT&T Nassau Metals*, 381 S.E.2d 206, 208 (S.C. 1989) ("There is no general rule which establishes that the tort ... will always be immune from preemption").

But *Lingle* does not carve out any such "exception" for workers' compensation cases. *See Nash*, note 15, *supra*. Nor does it suggest, contrary to the prevalent view of the lower courts, *see Nelson*, note 15, *supra*, that certain types of state-law rights are by their very nature "independent" of labor agreements and "not subject to preemption."[16]

Rather, *Lingle* emphasizes that the test of "'independent' that matters for §301 pre-emption purposes" is whether "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407. That determination, the Court previously made clear in *Lueck*, can only be made on a "case-by-case basis." *Lueck*, 471 U.S. at 220. The issue is not the inherent nature of the state-created cause of action, but whether the right "*as applied*" in a particular lawsuit would require interpretation of a labor agreement. *Lueck*, 471 U.S. at 209 (emphasis added).

This Court should grant review to correct the widespread impression in the lower courts, which conflicts with *Lueck* and *Lingle* and the Supreme Court of South Carolina's decision in *Nash*, note 15, *supra*, that workers' compensation retaliation cases constitute a special "exception" to the reach of federal preemption.

A further distinct but related question has also sharply split the courts: Does §301 preempt a plaintiff's claim where, as here, the employer injects CBA provisions into the case by way of defense? The cases fall into essentially three groups on this question, with two answering in the negative and one in the affirmative.

One line of cases, relying on *Caterpillar Inc. v. Williams* 482 U.S. 386 (1987), rejects the notion of "defensive preemption"

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[16] *See also* White, *supra*, at 413 (*Lingle* "was not resolved on the basis of the nature of the state law claim").

out of hand.[17] *Caterpillar* involved the issue of the limited jurisdiction of the federal courts in the removal context. The Court held that a defendant-employer sued in state court under state law could not create federal removal jurisdiction by raising CBA issues in its defense, observing that, in the removal context, the plaintiff is "the master of the claim." *Caterpillar*, 482 U.S. at 392. Absent "complete preemption" of the plaintiff's claim the federal district court in such a case lacks removal jurisdiction. *Id.* at 393.

To allow a plaintiff to control the choice of a state-court *forum*, however, is not to say he may unilaterally (by not mentioning the CBA provisions in his complaint) immunize his state-law claim from preemption under the test of *Lueck*. *See Hanks*, *note 17*, *supra*; White, *supra*, at 408-10. *Caterpillar* does not speak to the latter issue (so-called "ordinary preemption") and addresses defensive preemption strictly in the context of removal jurisdiction. Nonetheless, the interplay (if any) between *Caterpillar* and *Lueck*, and between "complete" and "ordinary" preemption, has been a source of much confusion and division in the lower courts. *See* White, *supra*, at 403-10 (and the authorities there cited and compiled). This case is an appropriate vehicle for the Court to resolve the conflict and to give guidance.

A second line of cases holds, as did the court below (A-4 to 5), that where the employer's "motivation" is a key element of the plaintiff's claim, that issue is always "purely factual" and, under the authority of *Lingle*, the claim is not preempted.[18] These cases

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[17] *See, e.g.*, *Nelson*, 878 F.2d at 202-203 ("the defendant may not destroy the state-law character of the plaintiff's suit merely by raising a legal defense"); *accord Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192, 197 n.8 (7th Cir. 1989); *contra Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988) and other cases cited in note 22, *infra*.

[18] *See Jarvis v. Nobel/Sysco Food Services Co.*, 985 F.2d 1419 (10th Cir. 1993) (workers' compensation retaliation claim not preempted because only issue was "motive" of employer); *accord Marshall v. TRW, Inc.*, 900 F.2d

(Footnote 18 continued on next page)

so hold even where, as here, the employer contends that its reason and "motive" for terminating the employee was the employee's violation of specific provisions in the CBA (which the jury will need to interpret and apply, thereby triggering preemption). Some of these courts, like the one below, simply cite *Lingle* as authority and summarily reject such contentions by employers (even though, as noted in point B above, *Lingle* is fundamentally inapposite because the arbitrator's award foreclosed any such contention by Norge).

Other courts of this second school also rely on the language of *Lingle* but attempt to take the analysis a step farther. They say, drawing a very fine distinction, that the jury will need to decide only whether the employer's motive was truly to carry out its interpretation of its rights under the CBA (rather than some retaliatory motive), without further having to decide whether the employer's interpretation of the CBA is actually "*correct.*"[19]

(Footnote 18 continued)

1517 (10th Cir. 1990); *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990); *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473 (6th Cir. 1990); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989); *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir. 1989); *Jones*, 931 F.2d at 1090 (workers' compensation retaliation claim not preempted because employer's CBA defenses merely go to the question of "credibility"); *cf. Sweeney v. Westvaco Co.*, 926 F.2d 29, 36 (1st Cir.) *cert. denied*, ___ U.S. ___, 112 S.Ct. 274 (1991) (but if "reasonableness" of employer's conduct is at issue rather than "motive," claim is preempted).

[19] *See Smolarek*, 879 F.2d at 1334 (only issue was whether employer "felt bound" by its interpretation of the CBA, not whether its "interpretation . . . is correct"); *Jarvis*, 985 F.2d at 1427 (employer's "contention that it was motivated by its understanding of the CBA is a factual matter for the jury" but the "correctness" of the employer's interpretation is not at issue, only whether it was held in "good faith" and "actually motivated" the employer); *Eldridge*, 920 F.2d at 1439 ("It is irrelevant whether the company's reliance on the labor agreement was reasonable or whether its interpretation of the agreement was correct"); *Bettis*, 878 F.2d at 197 (jury "must simply determine whether such a [non-retaliatory] motive exists — not whether . . . the CBA justifies such a motive").

Under this theory the jury will assess only the employer's subjective state of mind, without ever deciding whether the CBA actually conferred the rights the employer claimed to be exercising.

This distinction, not surprisingly, has been severely criticized. *See* White, *supra*, at 429-31; Marcus, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 221 (1989). How can the credibility of the employer's asserted "motive" to enforce and comply with specific provisions in a CBA be assessed without looking at those provisions to see what they say and what they appear to mean? It is unrealistic to presume that the jurors in such a case would be willing (or even able) to close their eyes to what the CBA provisions actually say and to reach no conclusions at all as to whether the employer's interpretations of the provisions and reliance thereon were reasonable or not.[20] The compelling federal labor law policy requiring uniformity of CBA interpretation — so that employers and unions can rest assured in the certainty that their bargained-for words and phrases will always be given their customary interpretation by *arbitrators* in accord with the *law of the shop* — is just as severely jeopardized in this case as it was in *Lueck*. The prospect that state-court jurors will be making their own determinations of Hussmann's rights under its bargained-for agreement with the Steelworkers is a matter of utmost concern to Hussmann and, we submit, to the federal interests embodied in §301.[21] This Court should grant review to scrutinize this widespread but highly suspect view of the lower courts.

[20] These realities of human nature will not change even if, as occurred in one case, the jurors are specifically instructed not to engage in interpretation of the labor agreement in assessing the employers asserted motive predicted thereon. *Marshall v. TRW, Inc.*, 900 F.2d 1517, 1524 (10th Cir. 1990).

[21] *See McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 538 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 912 (1992) ("[t]o exempt [plaintiff's] claims from preemption [where employer raises CBA defenses] would be to invite the courts of these states to give conflicting constructions to the single CBA in determining whether management conduct is wrongful"); White, *supra*, at 431; *see also* the cases cited in the next footnote.

The third line of cases, in direct conflict with the first two, holds that where, as here, the employer points to specific provisions in the CBA as its reasons for discharging the plaintiff, the state-law discharge claim is preempted.[22] In such a case, these courts hold, the fact finder will need to engage in interpretation and application of the CBA provisions in order to resolve the merits of the claim, thereby triggering preemption under §301.

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[22] *Nash*, note 15, *supra* (workers' compensation wrongful discharge claim preempted where employer's defense was that employee refused to comply with CBA provision requiring him to be examined by doctor selected by employer). All of the following cases likewise sustained preemption based on employer CBA defenses but involved claims other than for workers' compensation retaliatory discharge: *Mock v. T.G.&Y. Stores Co.*, 971 F.2d 522, 524 & 530 (10th Cir. 1992) (plaintiff's claims "arose out of the manner in which [employer] conducted its investigation of suspected employee misconduct"; whether employer "wrongfully interrogated" plaintiff "will inevitably require analysis of what the CBA permitted"); *Johnson v. Anheuser Busch, Inc.* 876 F.2d 620, 624 (8th Cir. 1989) (whether alleged wrongful acts regarding discharge and "the investigation leading up to it" were "intentional" "would require us to decide whether [plaintiff's] discharge was warranted under the terms of the CBA"); *McCormick*, 934 F2d at 536 (claim preempted where employer's "authority" to act and the "rightness or wrongness" of its conduct is measured against CBA); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1018 & 1020 (10th Cir. 1990) (factfinder cannot determine wrongfulness of employer's conduct "without determining whether [it] was allowed under the [CBA]"; "Indeed, '[a]ctions that the [CBA] permits might be deemed reasonable in virtue of the fact that the CBA permits them'"); *Clark v. Newport News Shipbuilding and Dry Dock Co.*, 937 F.2d 934, 937 (4th Cir. 1991) ("So long as the employer acted within his contractual rights, the claims cannot be evaluated without reference to the contract for a determination of whether the employer's actions were reasonable under the contract, taking into account the 'expectations of the parties' in light of the provisions of the agreement"); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 121 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989) (due to CBA defenses trial would "prominently feature the labor pact and its due construction"); *Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400 (9th Cir.), *cert. denied*, 498 U.S. 835 (1990); *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989); *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988); *Newberry v. Pacific Racing Assoc.*, 854 F.2d 1142 (9th Cir. 1988).

In the case at bar, as plaintiff's own admissions confirm (*see* pp. 4 - 5, *supra*), the key issue in the trial of this case would be whether Hussmann acted properly in asking Cook questions about the apparently false statements in her employment application and in terminating her for refusing to answer. That issue, plainly, cannot be resolved without interpreting and applying the express[23] provisions in Hussmann's labor agreement which specifically address this situation and upon which Hussmann explicitly relied. *See* pp. 3 - 5, *supra*.

Under the cases of the third line, which conflict with the cases of the first two lines cited above, but which are in full accord with this Court's pronouncements in *Lingle* and *Lueck*, the court below should have found Cook's claims to be preempted by §301. This Court should grant review to settle the conflicts and to resolve these fundamental issues going to the very heart of the doctrine of §301 preemption.

Another question presented by this case — a question expressly reserved in *Lingle*, 486 U.S. at 409 n. 9 — is whether Cook's claim is barred by "waiver." Assuming *arguendo* Hussmann's "motive" could be assessed without interpreting the CBA and there is otherwise no preemption under the *Lueck/Lingle* contract-interpretation test, the further question then is whether Cook's state-law rights were nonetheless *waived* by the CBA entered into by the Steelworkers union on her behalf. The court below expressly held they were not (A-6).

As Cook's admissions make clear (pp. 4 - 5, *supra*), the key state-law right Cook claims Hussmann violated was her alleged right not to be asked questions about the injuries she denied having on her original employment application and her corresponding right to refuse to answer the questions. It is clear, however, that Hussmann had express and implied rights under

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[23] "Implied" rights and duties under the CBA might also need to be considered in resolving Cook's claim. *See Lueck*, 471 U.S. at 215.

the CBA to ask the questions and to discipline (including discharge) her for refusing to answer. *See* CBA provisions at pp. 3 - 5 , *supra*; *see also Laws*, 852 F.2d at 433-4 (CBA expressly and impliedly authorized employer to investigate suspected contract violation [re intoxication] and to discipline for insubordination employee who refused to be tested); *Clark v. Newport News Shipbuilding and Dry Dock Co.*, 937 F.2d 934, 937 (4th Cir. 1991) (employer may investigate and discharge for contract violations).

Cook's asserted state-law rights are thus diametrically opposed to Hussmann's rights under the CBA. This case squarely presents the question whether CBA provisions may "waive" and supersede rights existing under state law.[24] This is a fundamentally important question under the federal labor scheme,[25] as *Lingle*'s reservation of it confirms, and this case provides an appropriate vehicle to review it.

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[24] A further issue is whether the nonwaiver provision in the Missouri statute (*see* A-6) is itself preempted by federal labor law. *See Lingle*, 486 U.S. at 409 n. 9.

[25] The decision below also conflicts with the following cases on this issue: *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001 (9th Cir. 1987) ("union can waive the right of [an] employee to the protection of [state-law] tort"); *McCormick*, 934 F.2d at 537 ("If management . . . was entitled under the agreement to [act] in the manner it did, its actions *ipso facto* could not have been wrongful under state law"); *see also Medrano v. Excel Corp.*, 985 F.2d 230, 234 n. 3 (5th Cir. 1993) ("when a plaintiff asserts that acts unquestionably taken in accordance with the provisions of the CBA were nonetheless tortious, such claims will obviously require an interpretation of the CBA" and are therefore preempted); *but see Jarvis*, 985 F.2d at 1429 ("[t]he purpose of these actions [for retaliatory discharge] was to override the contractual rights of the employer").

CONCLUSION

Petitioner Hussmann Corporation respectfully submits that its Petition for a Writ of Certiorari to the Supreme Court of Missouri should be granted.

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 75142

ROSETTA COOK,
Appellant,

vs.

HUSSMANN CORPORATION,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

Honorable Robert W. Saitz, Judge

[Duplicate of filing on: April 20, 1993]

Section 287.780, RSMo 1986,[1] protects employees from retaliatory discharge or discrimination brought about by the employees' exercise of rights granted by the Workers' Compensation Act, Chapter 287, RSMo. We hold that neither federal nor Missouri law requires an employee to invoke or exhaust the grievance procedure in a collective bargaining agreement before filing suit under the statute. We accordingly reverse the summary judgment in favor of respondent, and remand.

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[1] The statute provides as follows:

> Discrimination because of exercising compensation rights prohibited — civil action for damages. — No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

I.

On review of a defendant's motion for summary judgment, this Court views the record in the light most favorable to the plaintiff, according to plaintiff all reasonable inferences that may be drawn from the evidence. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed in connection with the motion, demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Rule 74.04(c); Martin v. City of Washington,* __ S.W.2d __, __ (Mo. banc 1993).

The record below establishes that appellant Rosetta Cook was injured in the course of her employment with respondent Hussmann Corporation, a Missouri corporation, and that she filed a claim for workers' compensation against respondent and the second injury fund. The claim made reference to certain injuries sustained by appellant before she began working for respondent. Appellant asserts that respondent repeatedly tried to interrogate her concerning these injuries. On the advice of her attorney, appellant refused to answer respondent's questions unless she was allowed to have her attorney or a shop steward present in the room. Appellant alleges that she was suspended and then fired from her job because of this refusal.

Respondent filed a motion to dismiss or for summary judgment, supported by the affidavit of its general counsel and vice president. The affidavit asserts that appellant was covered by a collective bargaining agreement between respondent and the United Steelworkers of America. It states that appellant was terminated for insubordination and for failing to disclose pre-employment injuries and back problems in her employment application, in violation of plant rules and the labor agreement. Finally, it asserts that appellant never invoked the agreement's grievance procedure with respect to her discharge. Respondent

argues that, under federal law, appellant's failure to grieve her discharge precludes her from obtaining relief under *§ 287.780*.

Appellant and her attorney filed affidavits in opposition to respondent's motion, containing a detailed chronology of the events leading to the discharge. Appellant's affidavit adduces an admission by respondent that appellant would not have been questioned about her prior injuries if she had not filed her compensation claim.

The circuit court sustained respondent's motion for summary judgment, on the grounds that appellant did not file a grievance in accordance with her collective bargaining agreement. The Eastern District of the Court of Appeals reversed, holding that a civil action filed under *§ 287.780* is independent of the collective bargaining process and is not preempted by federal law. We granted transfer to resolve a conflict with earlier decisions that required exhaustion of the grievance mechanism prior to filing suit under the statute. *See Kramer v. McGlynn Bakeries, Inc.*, 738 S.W.2d 892 (Mo. App. 1987); *Barks v. Bi-State Development Agency*, 727 S.W.2d 464 (Mo. App. 1987); *Brock v. Stout Industries, Inc.*, 717 S.W.2d 278 (Mo. App. 1986); *McKiness v. Western Union Telegraph Co.*, 667 S.W.2d 738 (Mo. App. 1984).

II.

Appellant's first point asserts that her retaliatory discharge claim is not precluded by the collective bargaining agreement under either federal or Missouri law. Federal law controls the resolution of labor disputes when the parties have negotiated a collective bargaining agreement, through the Labor Relations Management Act, 29 U.S.C. *§ 185 et seq*. The United States Supreme Court has held that *§ 301* of the act preempts state law remedies that conflict with those provided by a labor contract. When the resolution of a state law claim is "substantially dependent" upon analysis of the terms of a labor contract, the

claim must be treated as a *§ 301* claim or dismissed as preempted by federal labor law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). The Eighth Circuit Court of Appeals interpreted *Lueck* to bar state statutory claims for retaliatory discharge when the parties are covered by a collective bargaining agreement. *Johnson v. Hussmann Corp.*, 805 F.2d 795, 797 (8th Cir. 1986).

Our court of appeals was guided by these decisions when considering the impact of labor agreements on the right of action created by *§ 287.780*. In *McKiness*, the court ruled that whether an employee was discharged for exercising her workers' compensation rights is a dispute falling within the subject matter of a labor agreement. Thus, the court held that employees must exhaust the remedies provided in the agreement before seeking redress under *§ 287.780*. 667 S.W.2d at 741; *accord Kramer*, 738 S.W.2d at 894-5; *Barks*, 727 S.W.2d at 467. Further, the court gave preclusive effect to factual determinations reached through the collective bargaining grievance process when the agreement provides it is the exclusive remedy for disputes. *Brock*, 717 S.W.2d at 280; *accord Pratt v. Purcell Tire & Rubber Co.*, 846 S.W.2d 230, 233 (Mo. App. 1993).

Shortly after *Kramer*, *Barks* and *Brock* were decided, however, the United States Supreme Court recognized a limited exception to the reach of federal preemption in workers' compensation cases. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Supreme Court found that a state law remedy for retaliatory discharge is "independent" of a collective bargaining agreement, and thus not subject to preemption, if its resolution involves "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* at 407. This exception holds true even if the grievance mechanism and the state law remedy "would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself". *Id.* at 409-10.

"The analysis in *Lingle* applies with equal force to Missouri's workers' compensation statute." *Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988). Like the Illinois statute at issue in *Lingle*, *§ 287.780* created a judicially cognizable independent tort. *Hopkins v. Tip Top Plumbing & Heating Co.*, 805 S.W.2d 280, 286 (Mo. App. 1991); *Reed v. Sale Memorial Hospital & Clinic*, 698 S.W.2d 931, 940 (Mo. App. 1985). A claim brought under our statute presents factual questions that relate solely to the conduct and intent of the parties. *See Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984).

In short, appellant alleges that respondent fired her in retaliation for bringing a workers' compensation claim. If true, such acts violate *§ 287.780*, and that statute provides that a civil suit for damages may be brought. The rights and remedies provided by *§ 287.780* are independent of and in addition to any rights provided by the collective bargaining agreement. Although these same acts might have allowed appellant to proceed against respondent under the collective bargaining agreement for remedies provided therein, she did not do so, nor was she required to do so. Because appellant's *§ 287.780* claim is separate and independent of the collective bargaining agreement, it is not preempted by federal labor law. *Accord Wolfe*, 850 F.2d at 470.

III.

Missouri law also generally holds that when a collective bargaining agreement provides a grievance procedure for the settlement of disputes between the employer and the union or the employee, the party aggrieved must exhaust the remedies provided by the agreement before resorting to the courts for redress. *Williams v. St. Joe Minerals Corp.*, 639 S.W.2d 192, 195 (Mo. App. 1982); *Williams v. Clean Coverall Supply Co.*, 613 S.W.2d 659, 661 (Mo. App. 1980); *accord Grubb v. Leroy L. Wade & Son, Inc.*, 384 S.W.2d 528, 533 (Mo. 1964). This rule, however,

applies only to claims brought under the labor agreement and alleging a breach of its provisions. The exhaustion requirement does not extend to claims based exclusively on a violation of independent employee rights derived from a source other than the agreement, such as *§ 287.780*.

Moreover, the rights protected by *§ 287.780* cannot be bargained away. *See Haase v. New Hampshire Insurance Co.*, 795 S.W.2d 543, 544 (Mo. App. 1990). The Workers' Compensation Act provides that "no agreement by an employee or his dependents to waive his rights under this chapter shall be valid". *§ 287.390.1* RSMo Supp. 1992. The plain intent of this statute is, *inter alia*, to preserve the right of action granted by *§ 287.780*. Thus, under Missouri law, the inclusion of a grievance mechanism in a collective bargaining agreement cannot be deemed to be a waiver, either implicit or explicit, of the employees' statutory right to bring a civil action for retaliatory discharge or discrimination.[2] Accordingly, we hold that a *§ 287.780* suit may be brought without first invoking or exhausting the collective bargaining grievance process. The grant of summary judgment based on appellant's failure to grieve her discharge was in error.

Our disposition of this issue renders it unnecessary to consider appellant's remaining contentions. The summary judgment in favor of respondent is reversed, and the cause is remanded to the trial court for further proceedings.

WILLIAM RAY PRICE, JR., JUDGE

All concur.

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[2] The Supreme Court in *Lingle* left open the question of whether a union may waive its members' individual, nonpreempted state law rights. The Court noted that it would require "clear and unmistakable" evidence of waiver before deciding whether federal law preempts a state law bar (such as Missouri's *§ 287.780* to the waiver of these rights. 486 U.S. at 409 n. 9. The parties did not present such evidence of waiver in this case.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 60428

ROSETTA COOK,
Plaintiff-Appellant,

v.

HUSSMANN CORPORATION,
Defendant-Respondent.

Appeal from the Circuit Court of the County of St. Louis

Honorable Robert W. Saitz

OPINION FILED: June 30, 1992

Rosetta Cook (Plaintiff) instituted a discriminatory discharge action against Hussmann Corporation (Defendant) alleging that she was discharged because she filed a Workers' Compensation claim under § 287.780 RSMo 1986. The Circuit Court of St. Louis County entered summary judgment in favor of defendant and plaintiff appeals. We reverse and remand.

BACKGROUND

The pleadings, affidavits of both plaintiff and defendant and the exhibits reveal the following facts. Plaintiff, an employee of defendant, sustained injuries in the course and scope of her employment, and on August 9, 1990, filed a workers' compensation claim under § 287.780 RSMo 1986,[1] against defendant

[1] § 287.780 RSMo 1986 provides:

No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

All statutory references refer to RSMo 1986 unless otherwise cited.

and the second injury fund. A collective bargaining agreement was in force between defendant and Local 9014, United Steelworkers of America. Plaintiff was subject to its terms. Defendant received plaintiff's workers' compensation claim form, including the second injury fund claim, on August 16, 1990. In its answer to the claim for compensation, defendant admitted the accident.

Plaintiff's attorney informed her that it was unethical for any one employed by defendant and/or its insurance company to talk to her concerning her claim and that she should refuse to discuss her claim.

Plaintiff alleges that defendant discriminated against her in the following manner:

(a) In the morning of August 21, 1990, Eldon Williams, an employee of defendant's industrial relations department, called plaintiff to his office to discuss her claimed injuries. Plaintiff refused to divulge any information based upon her attorney's advice. In addition, plaintiff requested the presence of a shop steward, which was denied. Later in the afternoon, Ron Frank, superintendent of defendant's plant, escorted plaintiff to Mr. Williams' office. Plaintiff refused to answer any questions without the presence of a shop steward. Consequently, plaintiff was suspended.

(b) On August 27, 1990, defendant made repeated efforts to interrogate plaintiff concerning the details of her worker's compensation claim and the injuries claimed therein.

(c) On August 28, 1990, plaintiff met with Mr. Williams, another company official and a union representative. Plaintiff was questioned about her original employment application form and the injuries stated in her second injury claim fund. Once again plaintiff refused to give any information.

(d) On September 5, 1990, plaintiff received notice of her discharge from defendant's employ. Defendant's reasons for terminating plaintiff were violations of Plant Rule 1 (falsification of application or other company records), Plant Rule 20 (insubordination) and Article 9 § 4 paragraph I of the collective bargaining agreement (falsification or omission of relevant information on employment application).

Plaintiff did not grieve her discharge. Instead, she filed a petition alleging she was discriminatorily discharged for exercising her rights under the Missouri Workers' Compensation law. Plaintiff's petition incorporates the four elements required to state a cause of action for discriminatory discharge, namely: (1) plaintiff's status as an employee of defendant prior to the injury, (2) plaintiff's exercise of a right granted by Chapter 287, (3) employer's discharge of or discrimination against plaintiff, and (4) an exclusive causal connection between plaintiff's actions and defendant's actions. *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984); *Wiedower v. ACF Industries, Inc.*, 715 S.W.2d 303, 305 (Mo. App. 1986) appeal after remand 763 S.W.2d 333 (Mo. App. 1988); *Hopkins v. Tip Top Plumbing And Heating Co.*, 805 S.W.2d 280, 283 (Mo. App. 1991).

Defendant moved for summary judgment on three separate grounds, namely: (1) plaintiff failed to exhaust the grievance procedure under the governing collective bargaining agreement, (2) plaintiff's claim is preempted by § 301 of the federal Labor-Management Relations Act, 29 U.S.C. § 185(a), (3) the petition fails to state a claim upon which relief may be granted. Defendant attached the affidavit of its general counsel, Burton Halpern, which established that plaintiff was governed by the collective bargaining agreement and she neither grieved nor invoked the contractual grievance/arbitration procedure. Plaintiff and her attorney filed affidavits opposing summary judgment but did not dispute the two facts established by Mr. Halpern's affidavit. The

trial court granted defendant's motion for summary judgment on the ground that plaintiff failed to grieve her discharge.

ISSUES ON APPEAL

Plaintiff raises three issues on appeal. We limit our discussion to the first issue which is dispositive. The gist of plaintiff's first issue is that the statutory right for actual and punitive damages under § 287.780 exists independently of, and cannot be contracted away or provided for in the collective bargaining agreement. In addition, plaintiff asserts that the collective bargaining agreement does not provide for enforcement of the "public policy" right afforded by § 287.780.

STANDARD OF REVIEW

When reviewing a summary judgment motion, we glean through all the pleadings, depositions, answers to interrogatories and admissions on file, along with the affidavits to ascertain whether there is any material fact issue and whether the moving party is entitled to judgment as a matter of law. *Magee v. Blue Ridge Professional Building Co., Inc.*, 821 S.W.2d 839 (Mo. banc 1991). The party opposing summary judgment "may not rest upon mere allegations or denials in his pleadings but must, . . . by affidavits or otherwise, set forth specific facts showing a genuine issue for trial." *St. Charles County v. Dardenne Realty Co.*, 771 S.W.2d 828, 830 (Mo. banc 1989).

A summary judgment will be sustained on appeal if it is supportable on any theory, even though not the one adopted by the trial court. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. banc 1984); *St. Louis Children's Hospital v. Commerce Bancshares, Inc.*, 799 S.W.2d 87, 90 (Mo. App. 1990). We review the record in the light most favorable to plaintiff. *Zafft*, 676 S.W.2d at 244.

DISCUSSION

Ab initio, we determine whether plaintiff's reliance on *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280 (Ill. 1984), 105 Ill. 2d 143, 85 Ill. Dec. 475 *cert. denied* 472 U.S. 1032, 105 S.Ct. 3513 and *cert. denied* 474 U.S. 909, 106 S.Ct. 278 is justified, and whether her cause of action for wrongful discharge stands, notwithstanding the fact that plaintiff failed to exhaust the grievance procedure mandated by the collective bargaining agreement. In *Midgett,* the Illinois Supreme Court held that union employees governed by a collective bargaining agreement could institute a tort action for retaliatory discharge "independent of any contract remedy the employee may have based on the collective-bargaining agreement."[2] 473 N.E.2d at 1283. In extending this independent tort action to union employees, the Illinois Supreme Court relied on the strong public policy of the State of Illinois in ensuring the protection of workers covered by the Workers' Compensation Act. *Id.* at 1284. Imposition of sanctions on violators of strong pubic policy and assessing punitive damages against employers who unjustly discharge employees was the main concern of the *Midgett* Court. *Id.*

Missouri Courts recognize that § 287.780 creates an "independent tort action for retaliatory discharge", and when the employer's actions warrant it, an award of punitive damages may lie. *Reed v. Sale Memorial Hosp. And Clinic,* 698 S.W.2d 931, 940 (Mo. App. 1985); *Wiedower,* 715 S.W.2d at 308; *Krasney v. Curators of University of Mo.*, 765 S.W.2d 646 (Mo. App. 1989) (". . . a violation of § 287.780 of the Workers'

---

[2]Other jurisdictions recognizing that employees are not limited to contractual remedies are: "Puchert v. Agsalud (1984), Haw., 677 P.2d 449; Peabody Galion v. Dollar (10th Cir. 1981), 666 F.2d 1309; Carnation Co. v. Borner (Tex. 1980), 610 S.W.2d 450; Vaughn v. Pacific Northwest Bell Telephone Co. (1980), 289 Or. 73, 85-89, 611 P.2d 281, 287-90; Judson Steel Corp. v. Workers' Compensation Appeals Board (1978), 22 Cal.3d 658, 586 P.2d 564, 150 Cal. Rptr. 250." 473 N.E.2d at 1284-1285.

Compensation Law gives rise to a cause of action in damages for retaliatory discharge in favor of an employee . . . against the employer.") 765 S.W.2d at 651 n. 7 (citing *Hansome, supra,* and *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 149 (Mo. App. 1983).

The *Reed* Court states that § 287.780 declares "public policy" and should be construed in a manner whereby the remedy sought to be achieved by its enactment is promoted. 698 S.W.2d at 940. The "evil to be remedied" was the lack of an effective remedy for retaliatory discharge actions brought under Chapter 537. *Id.* In conclusion the *Reed* Court stated:

> One of the bases for recognition of a "common law" right to recovery was the inadequacy of the remedy afforded by criminal statutes which prohibited employers from interfering with their employees' exercise of their rights under the Workers' Compensation Law. *See Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, 359 (1979); *Lally v. Copygraphics,* 173 N.J. Super. 162, 413 A.2d 960, 969 (1980). *Id.*

In creating a "judicially cognizable tort" under § 287.780 Missouri courts have been motivated by a 'public policy' concern. In addition, our courts have drawn support from other jurisdictions in imposing punitive damages to quell unjustified employer action. *See Reed, supra* n. 2.

Here, the introductory clause of Article 7, in the Collective-Bargaining Agreement, reads as follows:

> "Section 1. The parties desire that complaints and grievances be settled *whenever possible* by the supervisor and the employee(s) in the department where the complaint originates.
>
> Grievances are defined as an alleged violation by the Company of a specific provision of this Agreement." (emphasis added).

Defendant argues that this language suggests a mandatory grievance procedure, which is expressly stated to be "final and binding." We read the language as permissive, not mandatory. *Cf. Barks v. Bi-State Development Agency*, 727 S.W.2d 464 (Mo. App. 1987);[3] *Brock v. Stout Industries, Inc.*, 717 S.W.2d 278 (Mo.App. 1986).[4] As a result, plaintiff can pursue an alternate route, particularly where, as here, plaintiff has satisfied the four elements necessary to bring an action for retaliatory discharge.

We are mindful of the teachings of *McKiness v. Western Union Telegraph Co.*, 667 S.W.2d 738, 741 (Mo. App. 1984), *Brock v. Stout Industries, Inc., supra* and *Barks v. Bi-State Development Agency, supra,* requiring exhaustion of the grievance procedure prior to resorting to the courts for redressal. However, in the above cited authorities, the court considered plaintiff's claim as though it were a breach of the collective-bargaining agreement, as opposed to a tort action. Accordingly, federal decisions mandating exhaustion of grievance procedures controlled. *See* Martucci & Eglinski, *Emerging Employment Litigation: Wrongful Discharge Update,* 45 J. of Mo. Bar 179, 184 (1989). *See also Johnson v. Hussmann Corp.*, 805 F.2d 795, 797 (8th Cir. 1986) (employee's state law tort claim for retaliatory discharge was pre-empted by federal labor law and stated a federal cause of action and was therefore properly removed to federal court.)

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[3] "Section 4 of the Collective Bargaining Contract provides in pertinent part that:

Any question relating to grievances or the interpretation of any provision of this Agreement arising between the Company and the Union or the employees which cannot be amicably adjusted by conferences, shall be submitted to arbitration as provided herein." *Barks*, 727 S.W.2d at 466.

[4] "All grievances shall be settled and determined exclusively by the Grievance Procedure . . . " *Brock*, 717 S.W.2d at 280.

We are guided by the United States Supreme Court decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988) where the Supreme Court expressly addressed the issue: "whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state-law remedy for retaliatory discharge." 108 S.Ct. at 1879. In *Lingle*, the plaintiff filed suit in Illinois state court claiming she was discharged by her employer for exercising her rights under the Illinois Workers' Compensation Act. Illinois permits an employee, who is discharged for filing a workers' compensation claim, to sue for damages. The *Lingle* Court found that the elements necessary to bring a retaliatory discharge claim in Illinois did not require interpretation of any terms of the collective-bargaining agreement. *Id.* at 1882. The Supreme Court was aware that resolving a dispute according to a collective-bargaining agreement, on the one hand, and state law, on the other, would involve a similar factual inquiry. *Id.* at 1883. Therefore, the Supreme Court concluded that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes." *Id.*[5]

Defendant cites to *Kramer v. McGlynn Bakeries, Inc.*, 738 S.W.2d 892 (Mo. App. 1987) to advance the proposition that "the very allegation of discriminatory discharge in violation of § 287.780 is itself 'dependent upon terms of the collective-bargaining agreement for its proper resolution.' " 738 S.W.2d at 895. *Kramer* is distinguishable from the present case. The "acts of discrimination" complained of in *Kramer*, (for example,

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[5] In a different factual context, the court, in *Southwestern Bell Telephone Co. v. Buie*, 758 S.W.2d 157 (Mo. App. 1988), relying on *Lingle*, held that state law applied where the collective-bargaining agreement had not been interpreted by the trial court. *Id.* at 161. *Buie* was not a retaliatory discharge case. Buie grieved his suspension and chargeback of commissions which was upheld by the arbitrator.

reduction in working hours after plaintiff filed her Workers' Compensation claim, defendant's refusal to pay disability benefits or reimburse her medical expenses, "to retain the same days off that she had previously had.") warranted construction and interpretation of the collective-bargaining agreement. *Id.* Accordingly, the *Kramer* Court held that plaintiff's claim was preempted by federal law. Here, the "acts of discrimination" are independent of the collective-bargaining agreement.

We believe *Lingle* controls the present case. The "acts of discrimination" complained of do not compel construction or interpretation of the collective-bargaining agreement. Missouri permits an employee who is discharged for filing a workers' compensation claim to sue for damages. Plaintiff has stated a cause of action for discriminatory discharge under § 287.780. Defendant's motion for summary judgment cannot be sustained on any theory. *Zafft v. Eli Lily Co., supra.*

Judgment reversed and cause remanded for further proceedings.

/s/ James A. Pudlowski
JAMES A. PUDLOWSKI,
PRESIDING JUDGE

JUDGE ALBERT J. STEPHAN JR.,
and
JUDGE ROBERT E. CRIST, CONCUR.

APPENDIX C

IN THE CIRCUIT COURT
OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

DIVISION 6

No. 616212

Team B

ROSETTA COOK,
Plaintiff,

v.

HUSSMANN CORPORATION,
Defendant.

JUDGMENT

[Filed: June 18, 1991]

On December 26, 1990 defendant Hussmann Corporation filed its Motion for Summary Judgment and to Dismiss. On June 18, 1991, the matter came up for hearing, the parties appearing by counsel.

After considering the arguments of counsel, the parties' briefs, all exhibits, affidavits, and other matters of record, the Court finds it to be undisputed that plaintiff did not file a grievance in accordance with the collective bargaining agreement in existence at the time of the occurrence mentioned in the petition and the Court therefore concludes that defendant is entitled to judgment in its favor as a matter of law.

Accordingly, on this 18th day of June, 1991 it is hereby ORDERED, ADJUDGED AND DECREED that defendant's motion be and the same is hereby sustained and that plaintiff's

cause of action be and the same is hereby dismissed with prejudice, at plaintiff's costs.

SO ORDERED:

/s/ Robert W. Saitz
Judge

Dated: June 18, 1991

Supreme Court, U.S.
FILED
OCT - 6 1993
OFFICE OF THE CLERK

No. 93-111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HUSSMANN CORPORATION,
Petitioner,

VS.

ROSETTA COOK,
Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THIS WRIT	8
CONCLUSION	14

TABLE OF AUTHORITIES CITED

Page(s)

Cases:

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) 8,10

Beckman v. Freeman United Coal Min. Co., 122 Ill.Dec. 805, 527 N.E.2d 303 (Ill.1988) 9

Bettis v. Oscar Mayer Foods Corp., 878 F.2d 192 (7th Cir.1989) 11

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 9

Coleman v. Thompson, __ U.S. __, 111 S.Ct. 2546 (1991) 13

Electrical Worker v. Hechler, 481 U.S. 862 (1987) 10

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 13

Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo.banc 1984) 9

Johnson v. Hussmann Corp., 805 F.2d 797 (8th Cir. 1986) 10

Jones v. Roadway Exp., Inc., 936 F.2d 789 (5th Cir. 1991) 13

Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 103 (7th Cir.1987) 9

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 7,8,9,10, 11,12,13,14

Martin v. Carling National Breweries, Inc., 486 U.S. 1049 (1988) 9

Nash v. AT&T Nassau Metals, Inc., 381 S.E.2d 206 (S.C.1989) 10

Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989) 10

Uhler v. American Federation of Labor-Congress of Indus. Organizations, 486 U.S. 1310 (1984) 12

Wolfe v. Central Mine Equipment Co., 850 F.2d 469 (8th Cir.1988) 10

Constitutional Provisions and Statutes:

Article III, United States Constitution 10,12

28 U.S.C. §185(a), §301 of the Labor-Management Relations Act 6,8,9

28 U.S.C. §1445(c) 14

42 U.C.C. §12112(d)(4)(A) [Americans With Disabilities Act 14

29 C.F.R. §1630.13(b) 14

§287.780 R.S.Mo. (1973) 6,7,9,12,13

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STATEMENT OF THE CASE

The Facts

Respondent respectfully suggests that the Petitioner's Statement of the Case incorrectly states the operative facts by partially quoting from the affidavits of Rosetta Cook and Ray A. Gerritzen, her attorney, and failing to include other facts. Respondent believes it is necessary to point these out.

Hussmann had receipt of Cook's Missouri Workers' Compensation claim against Hussmann, which specifically indicates that she was represented by Ray A. Gerritzen, Attorney at Law (L.F. 18, 22, 35-36). Thereafter, Eldon Williams of Hussmann's Industrial Relations Department called Cook into his office, and Cook states the following occurred:

"Williams said to me, 'I want to talk to you about the injury that you have filed a claim against this company.' I then informed Eldon Williams that I had been instructed by my attorney, Ray A. Gerritzen, that no company representative had any right to privately talk to me about the case. I specifically informed Eldon Williams, 'It is very unethical for you to want to discuss this case with me, knowing I have a lawyer.' I had also stated, 'I am not discussing anything unless I have a shop steward present.' When these 2 statements were made by me to Eldon Williams he became extremely hostile, argumentative, pointed his finger in my face, and shouted in a loud voice at me, 'I have a right to discuss this injury claim with you and you sit down —you sit down!' as I was attempting to raise up out of my chair at the time. I repeated, 'I am not talking to you without a shop steward,' whereupon Williams stated, 'I demand for you to sit down and I am giving you a direct order to sit down in that chair!' He was extremely belligerent, continued to point his finger in my face, and repeated, 'You get back in that chair and sit down. I am giving you a direct order. Sit down!' He repeated that he had a right to talk to me as 'you're making a claim against this company', and 'I have a right to talk to you about this claim.' I then told Williams, 'I am not talking to you. I was brought up to respect my elders. You are old enough to be my father, and you're talking to me like a dog, and I am not talking to you without a shop steward' and I walked out of the office of Eldon Williams." (L.F. 11-12)[1]

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[1] Petitioner states at page 4 of its Statement of the Case that "He (Eldon Williams) called Cook to his office to inquire about the apparently false statements in her original employment application (id). Cook refused to answer Williams' questions. She stated it was 'unethical' for him to inquire of her because she had a lawyer and that she would not discuss anything without a union representative present, and walked out of his office (per

(Footnote 1 continued on next page)

Thereafter, Cook was called to Eldon Williams' office later that afternoon, and she states the following occurred:

> "At 12:45 p.m. I arrived for the second time at the office of Eldon Williams, having been brought there by Ron Frank. I was left standing in the hallway just outside Eldon Williams' office about 5 minutes, whereupon Eldon Williams came back into the office. Thereafter, Ron Frank and Eldon Williams had a discussion about whether or not Eldon Williams had talked to me 'like a dog'. Then I was instructed by Ron Frank to come into Williams' office. I repeated my request for a shop steward and Ron Frank repeated his denial of my request. After I resisted further attempts by Williams to discuss my Workers' Compensation claim, Eldon Williams stated, 'that there's no reasoning with her—take her out of here and suspend her.' Immediately thereafter, under the orders of Eldon Williams, Ron Frank took me to my time clock, instructed me to clock out, and demanded that I give my employee badge to him. This treatment of me and suspension from work was a clear discrimination against me because I exercised my rights under the Missouri Workers' Compensation law." (L.F. 12-13)[2]

(Footnote 1 continued)

Cook's affidavit, L.F. 11)." It should be noted that the only evidence presented by Hussmann was the CBA, (L.F. 37-69), and the Affidavit of Bruce Halpern (L.F. 35-36), its general counsel, who had no personal knowledge of these conversations. Halpern based his affidavit on review of Cook's employment records, which were never put into evidence. Cook filed her affidavit and her attorney's affidavit specifically detailing conversations with Eldon Williams. This is the only evidence of what was actually said during these conversations.

[2] Petitioner states at page 4 of its Statement of the Case, "At the conclusion of a second meeting later that day in Williams' office, when she again refused to answer any questions, Cook was suspended pursuant to Article 8 §4 (L.F. 12-13; see preceding footnote)."

Thereafter, Cook says the following occurred:

> "Sometime the night before or during that early morning of August 27, 1990, Eldon Williams called my home and left a message on my answering machine requesting I call him at 291-2000, station 2467. I relayed this message to my attorney, Ray A. Gerritzen" (L.F. 13).

Thereafter, Ray A. Gerritzen, Cook's attorney, says the following occurred:

> "On Monday morning, August 27, 1990, Rosetta Cook called me and advised me that Eldon Williams had left a message on her answering machine requesting that she call him at 291-2000, station 2467. At approximately 10:29 a.m. on August 27, 1990, I called Eldon Williams at the above number and re-informed him I represent Rosetta Cook and asked him what he wanted with her. His reply to me was, 'We want to talk to her about her original application and these injuries she says she has in this claim for compensation.' He said to me, 'This does not involve her attorney.' I advised him that in my opinion it does and I asked him to have his attorney call me. He asked for my phone number and asked my name. I specifically asked him if he did not have a copy of our Workers' Compensation claim in front of him. His reply was, 'We probably do have that somewhere around here, but this does not involve that claim.' I then asked him well, if it does not involve the claim, how come you want to question her about the injuries she claims she has in her claim. He did not answer that question. I repeated my request to have his attorney call me. I repeated my phone number and spelled out my name for him" (L.F. 19-20).[3]

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[3] Petitioner states at page 4 of its Statement of the Case, "A few days later, Williams explained to Cook's lawyer over the phone that 'we want to talk to her about her original application' (per counsel's affidavit, L.F. 19)."

Thereafter, Cook says the following occurred:

> On August 28, 1990, at approximately 10:30 a.m. at the request of the Defendant, I went to Defendant's plant and specifically a conference room at Defendant's office, where there was present Eldon Williams and Roger O'Neal. Also present was Brenda Singleton, vice president of the union at Hussmann Corporation. Roger O'Neal asked me questions regarding my original application for employment, whereupon I told Defendant I was not discussing the original application. Roger O'Neal then showed me my Missouri Workers' Compensation claim form for my current Workers' Compensation claim and began questioning me regarding the contents of the claim and the injuries I claimed I had. He requested detailed information regarding my injuries I claimed under the Missouri Workers' Compensation law, including the Second Injury Fund injuries stated on my claim. During those requests, Brenda Singleton specifically asked Williams and O'Neal 'If Rosetta had not filed her Workers' Compensation claim, would you have her in this office asking her these questions?' Roger O'Neal's specific answer was 'No, we would not.' When I refused to answer the questions from Eldon Williams and Roger O'Neal regarding my claimed injuries in my Workers' Compensation claim against Defendant, I left the office. It is clear this conduct by Defendant was a clear discrimination against me because I exercised my rights under the Missouri Workers' Compensation law." (L.F. 14-15)[4]

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[4] Petitioner states at page 4 of its Statement of the Case, "The next day Williams and another company official met with Cook and her union representative (L.F. 14). Cook admits she was asked questions 'regarding my original application for employment' (Cook's affidavit, L.F. 14). She further admits that 'I told [Hussmann] I was not discussing the original application' (id). As before, Cook refused to answer any questions and walked out of the room (Cook's affidavit, L.F. 12 & 14)."

Thereafter, Cook filed suit in St. Louis County stating she was discriminated against and discharged by Hussmann in violation of §287.780 (L.F. 70-73). She states this was a direct result of her exercise of her rights and remedies under the Missouri Workers' Compensation law (L.F. 72).[5] Hussmann filed a Motion for Summary Judgment attaching the affidavit of its in-house attorney and vice-president, Bruce Halpern, who based his affidavit upon review of Cook's employment records (L.F. 35-36) and moved for the suit to be dismissed based upon preemption of §301 of the Labor Management Relations Act, 29 U.S.C. §185(a) and Cook's failure to invoke or exhaust the grievance procedure under the CBA (L.F. 30-33).[6]

The Circuit Court of St. Louis County entered Summary Judgment for Hussmann on the express finding that it was undisputed that Plaintiff did not file a grievance in accordance with the CBA (L.F. 6). The Missouri Court of Appeals, Eastern District, reversed, finding that the grievance procedure under the CBA was permissive, not mandatory (Petitioner's Appendix A-

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[5] Petitioner states at page 5 of its Statement of the Case, "The petition alleged she was discharged 'particularly because she would not submit to private demeaning interrogation by Eldon Williams and others' (L.F. 72)." The Petition, in fact, states, *"Plaintiff further states that as a direct result of being discriminated against and ultimately discharged by the Defendant because of her filing a claim and pursuing her rights under the Missouri Workers' Compensation law,* and particularly because she would not submit to private demeaning interrogation by Eldon Williams and others *regarding her accident at work and injuries for which she filed a claim under the Workers' Compensation law."* (emphasis ours).

[6] Petitioner states at page 5 of its Statement of the Case, "Cook submitted an opposing affidavit stating inter alia that 'I was terminated solely and only because I refused to be interrogated by Hussmann personnel' (L.F. 10)." The Affidavit, in fact, states, "I was terminated solely and only because I refused to be interrogated by Hussmann personnel, *after I had filed a Missouri Workers' Compensation claim and Hussmann had written notice of the fact of my claim and representation of me by Ray A. Gerritzen, Attorney at Law."* (L.F. 10) (emphasis ours).

13), and following *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the four elements necessary to state a cause of action under §287.780 RSMo. do not compel the construction or interpretation of the CBA. (Petitioner's Appendix A-15). The Court noted the four elements: "(1) plaintiff's status as an employee of defendant prior to the injury; (2) plaintiff's exercise of a right granted by Chapter 287; (3) employer's discharge of or discrimination against plaintiff, and (4) an exclusive causal connection between plaintiff's actions and defendant's actions" (Petitioner's Appendix A-9). The Supreme Court of Missouri granted transfer "to resolve a conflict with earlier decisions that required exhaustion of the grievance mechanism prior to filing suit under the statute." (Petitioner's Appendix A-3). The Missouri Supreme Court, reversed the trial court following the decision in *Lingle, supra*, by holding that the 4 elements needed to be proven under a §287.780 cause of action did not require the interpretation of the CBA, and therefore, there was no preemption and Plaintiff was not required to exhaust the grievance procedures set forth in the CBA prior to bringing her civil cause of action under §287.780 (Petitioner's Appendix A-4-6). After noting that the parties did not present evidence of a waiver of the §287.780 rights in this case (Petitioner's Appendix A-6, n.2), the Missouri Supreme Court held that the rights protected by §287.780 cannot be bargained away by the inclusion of a grievance mechanism in a CBA (Petitioner's Appendix A-6). The Opinion did not address whether there would be a waiver based upon a provision in a CBA clearly waiving §287.780 or "clear and unmistakable" evidence of a waiver in a CBA, which issue was left open by this Court in *Lingle, supra*, at 409, n. 9.

On August 26, 1993, more than four months after the Missouri Supreme Court's Opinion, Hussmann filed an Answer in the Circuit Court of St. Louis County and raised as an affirmative defense certain provisions contained in the CBA as its motive for suspending and terminating Plaintiff.

REASONS FOR DENYING THIS WRIT

The Missouri Supreme Court Below Followed The Well-Settled Precedent Of This Court Concerning Preemption Under §301 Of The Labor-Management Relations Act, And Did Not Decide Any New Or Unique Federal Question Concerning Preemption; Any Alleged Conflict Between The Federal Circuit Courts Regarding Preemption Post-*Lingle* Involves Issues And Facts Not Present In This Case; And This Case Involves Factual Issues Unlikely To Arise In The Future Due To The Subsequent Enactment Of The Americans With Disabilities Act.

The limited exception to Federal preemption recognized in *Lingle*, followed and clarified the earlier precedent of this Court and does not need re-examination. In *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), this Court found preemption of a Wisconsin tort remedy for alleged bad faith in handling a disability insurance claim that was specifically provided for in the collective bargaining agreement. The determinative factual issue was described as whether the case involved non-negotiable state rights independent of the CBA or whether "evaluation of the tort claim (was) inextricably intertwined with consideration of the terms of the labor contract." Id. at 213.[7] In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), this Court specifically found there was no preemption of an Illinois Workers' Compensation retaliatory discharge suit, as none of the elements of the cause of action required a court to interpret any terms of the CBA. The elements of a Missouri and Illinois Workers' Compensation retaliatory discharge suit are the same,

[7] The Court specifically noted in *Lueck*, U.S. at 213, "Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

and therefore, there is no preemption in the underlying case.[8] This Petition should be denied as the sound decision in *Lingle*, does not need to be re-examined, and it clearly is controlling in the case at bar.[9]

The lower courts have uniformly applied the *Lingle* precedent holding that Workers' Compensation retaliatory discharge claims are not preempted by §301, when the elements of the cause of action do not require the interpretation of a CBA. Petitioner is

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[8] Under Illinois law, there are 3 elements of the cause of action: (1) Plaintiff's status as an employee of Defendant before injury; (2) Plaintiff's exercise of a right granted by the Act; (3) Employee's discharge causally related to the filing of a claim under the Act. *Beckman v. Freeman United Coal Min. Co.*, 122 Ill.Dec. 805, 807, 527 N.E.2d 303, 305 (Ill.1988). This Court in *Lingle*, U.S. at 407, noted only two elements, leaving off employee status. In Missouri, there are 4 elements: (1) Plaintiff's status as an employee of Defendant prior to the incident upon which the claim is based; (2) Plaintiff's exercise of a right granted by the Act; (3) Employer's discharge of or discrimination against Plaintiff; (4) an exclusive causal relationship between Plaintiff's exercising rights under the Workers' Compensation laws and Defendant terminating Plaintiff. *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo.banc 1984). The elements of the Missouri and Illinois cause of action are the same, because the third and fourth elements under Missouri law are the same as the third element under Illinois law. In Illinois, the cause of action is not based on specific statutory provisions, noted by this Court in *Lingle*, U.S at 406-407, n. 6, but in Missouri, there is specific statutory authority. §287.780 RSMo. (1973).

[9] Petitioner attempts to differentiate this case from *Lingle* based on the assumption that this Court's decision in *Lingle* was limited to employees who had already availed themselves of the arbitration process. To the contrary, this Court reversed and vacated the 7th Circuit's decision in *Lingle*, as to a consolidated claim which involved an employee who had not availed himself of the arbitration process. *Martin v. Carling National Breweries, Inc.*, 486 U.S. 1049 (1988); *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1034 (1987). Furthermore, in *Lingle*, U.S. at 410, n. 10, this Court cited *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394-395, for the proposition that plaintiffs could have sought redress under the CBA, but as masters of their complaint, were not required to do so.

really asking this Court to accept this case to issue an opinion on conflicts, it claims exist, between various courts on causes of action, other than Workers' Compensation retaliatory discharge. The one alleged conflicting Workers' Compensation retaliatory discharge case it cites is *Nash v. AT&T Nassau Metals, Inc.*, 381 S.E.2d 206 (S.C.1989), but *Nash*, in fact, was a claim for intentional infliction of emotional distress and outrageous conduct arising out of the employer's termination of the employee, after the employee refused to attend a medical appointment. The elements of the cause of action in *Nash*, and in fact, the entire cause of action, is different from the underlying case and the case present in *Lingle*. In fact, the *Nash* decision is in following with the case-by-case analysis of *Lingle* and *Lueck*. Petitioner, in essence, is asking this Court, in violation of *Article III of the United States Constitution*, to issue an advisory opinion on the issue of whether there is preemption in various state causes of action other than Workers' Compensation retaliatory discharge cases, such as slander, assault and battery, infliction of emotional distress, outrageous conduct, handicap discrimination, and racial discrimination. This Court should not issue opinions on hypothetical state law beyond that of the present case. *Electrical Worker v. Hechler*, 481 U.S. 862, 864 n. 5 (1987). Examination of the cases cited by Petitioner show that there is no confusion amongst the federal circuits or state courts as to Workers' Compensation retaliatory discharge suits, which do not involve the interpretation of a CBA, such as the underlying case and *Lingle*[10].

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[10] *Smolarek v. Chrysler Corporation*, 879 F.2d 1326 (6th Cir. 1989) (no preemption under Michigan Workers' Compensation retaliation suit and suit for discrimination under Michigan Handicappers' Civil Rights Act; dissent argues for preemption of handicap claim, but says no preemption of workers' compensation retaliation); *Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988) (no preemption of Missouri Workers' Compensation Retaliatory discharge suit, reversing *Johnson v. Hussmann Corp.*, 805 F.2d

(Footnote 10 continued on next page)

Petitioner also claims there is a conflict between the circuits as to whether an affirmative defense, based on a CBA, triggers federal preemption. This once again is premised upon Petitioner's request that this Court issue an advisory opinion on cases unlike the present one, being based exclusively on Workers' Compensation discrimination. There, in fact, is no conflict amongst the circuits regarding the preemptive effect of affirmative defenses in Workers' Compensation cases.[11]

The issue in the underlying case is whether the suspension and termination of Plaintiff's employment with Hussmann arose from Hussmann's attempted interrogation of Plaintiff about her Workers' Compensation claim, in the absence of her attorney, or whether the suspension and termination arose from an attempted interrogation about Plaintiff's employment application. This is purely a factual issue of Hussmann's motive, and it doesn't

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(Footnote 10 continued)

797 (8th Cir.1986) which had held, *pre-Lingle*, for preemption of Missouri Workers' Compensation retaliatory discharge suit); *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir.1989) (no preemption of Illinois Workers' Compensation retaliatory discharge claim). It should be noted that these cases involve state causes of action for workers' compensation retaliatory discharge suits with the same elements as *Lingle* and the present case. There are other decisions with causes of action that have completely different elements, as apparently, the particular State law does not recognize a specific cause of action for Workers' Compensation retaliatory discharge. These suits are usually claims for intentional infliction of emotional distress, claims for outrageous conduct, and/or claims for breach of implied covenant of good faith. Since these types of claims are contrary to Missouri law, they are irrelevant to this case and this inquiry.

[11] It is important to note that Hussmann never filed an Answer until August 26, 1993, well after the April 20, 1993 Missouri Supreme Court en banc opinion. As a consequence, the specific issue of preemption based upon Hussmann's affirmative defenses in its Answer was never before the Missouri Supreme Court, and Hussmann is once again requesting an advisory opinion from this Court.

involve the interpretation of the CBA. *Lingle, supra.* As such, there is no preemption. Petitioner claims the affidavits of Rosetta Cook and her attorney state otherwise, but the affidavits themselves show its claim to be misleading. (See Respondent's Statement of the Case.)

Petitioner next incorrectly states that the underlying case presents a ripe issue left open in *Lingle*. The Missouri Supreme Court Opinion states that "the rights protected by §287.780 (Missouri Workers' Compensation retaliatory discharge statute) cannot be bargained away", (Petition A-6) and Petitioner seeks to have this Court review that decision. The facts of the case show this portion of the Missouri Supreme Court opinion is dictum. Footnote 2 of the Missouri Supreme Court Opinion states:

> The Supreme Court in *Lingle* left open the question of whether a union may waive its members' individual, non-preempted state law rights. The Court noted that it would require "clear and unmistakable" evidence of waiver before deciding whether federal law preempts a state bar (such as Missouri's §287.780) to the waiver of these rights. 486 U.S. at 409 n. 9. *The parties did not present such evidence of waiver in this case.* (A-6) (emphasis ours)

Petitioner now seeks this Court to take this case to issue an advisory opinion on waiver of §287.780 by Plaintiff, when they never raised it at all in the trial court, the Missouri Court of Appeals, Eastern District, or the Missouri Supreme Court, not to mention the failure of raising "clear and unmistakable" evidence of a waiver. *Lingle*, 486 U.S. at 409 n. 9. This Court is constitutionally precluded from issuing advisory Opinions on the waiver issue, *Article III, United States Constitution*, as it is clear from the facts of this case that there is no evidenced case or controversy on waiver. *Uhler v. American Federation of Labor-Congress of Indus. Organizations*, 105 S.Ct.5, 468 U.S. 1310, 82 L.Ed.2d 896 (U.S.Col.1984). Second, this Court lacks jurisdic-

tion and its opinion on waiver would be advisory as the Missouri Supreme Court's decision that the §287.780 cause of action does not require the interpretation of the CBA is sufficient to justify their decision, and any resolution of the waiver issue would not affect the decision. *Coleman v. Thompson*, __ U.S. __, 111 S.Ct. 2546, 2553-2554 (1991). Besides this, Petitioner's Petition (pp.21-22) fails to cite any portion of the CBA which demonstrates "clear and unmistakable" evidence of a waiver, *Lingle*, 486 U.S. at 409 n. 9, as there isn't one. Therefore, the facts, as described by this Court in *Lingle*, to find a waiver are totally absent, even if same had been raised by Petitioner at any stage of this case before this Petition.

Also, contrary to Petitioner's position, federal law is clear, after this Court's decision in *Lingle*, that certain state labor standards, including Workers' Compensation, are not preempted. As stated by this Court in *Lingle, supra*, U.S. at 412:

> "In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987), we emphasized that 'preemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State.'"

Clearly, the recognition, that a worker, union member or not, cannot be discriminated against for asserting State Workers' Compensation rights, is such a labor standard. This is supported by Congress. As stated in *Jones v. Roadway Exp., Inc.*, 936 F.2d 789, 792 (5th Cir. 1991):

> "We instructed the district court to vacate its judgment and remand the case to state court because only a state law claim remained and because Congress had declared its intent that Workers' Compensation suits should be resolved in state court whenever possible. S. Rep. No. 1830, 85th Cong., 2nd Sess., reprinted in 1958 U.S. Code Cong. & Admin. News 3099, 3103-06 * * * In deciding to remand the case, we

> relied heavily on the fact that Congress had enacted a statute, 28 USC §1445(c), barring the removal from state court of an action arising under the Workers' Compensation laws of that state. Congress clearly intended that state courts should resolve workers' compensation suits."

This Court in *Lingle* clarified federal preemption with Workers' Compensation cases, and there is no reason to re-examine this sound precedent.

Even if it was determined that *Lingle* should be revisited, this case would not be an appropriate vehicle. This case involves an employee allegedly not disclosing a previous Workers' Compensation claim in an employment application. This inquiry is currently forbidden under the Americans With Disabilities Act. 42 USC §12112(d)(4)(A); 29 C.F.R. §1630.13(b). As a consequence, any decision by this Court would set a precedent only for cases that arose prior to the Americans With Disabilities Act. This waste of the Court's resources weighs heavily against revisiting *Lingle*, if there was such an inclination.

CONCLUSION

Respondent Rosetta Cook respectfully submits that the Petition for a Writ of Certiorari to the Supreme Court of Missouri be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HUSSMANN CORPORATION,
Petitioner,

VS.

ROSETTA COOK,
Respondent

Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Page

Cases:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 3, 6

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S.399 (1988)..... ..... *passim*

Martin v. Carling National Breweries, Inc., 486 U.S.1049 (1988)..... 5

Nash v. AT&T Nassau Metals, Inc., 381 S.E.2d 206 (S.C. 1989)..... 6

Statute:

Section 287.780 R.S.Mo. (1986)..... ..... 1, 2

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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition ("Opp.") emphasizes that the decision below is based on a simple analysis of the "elements" of a claim for workers' compensation retaliatory discharge under R.S.Mo. §287.780 and a straightforward determination that the Missouri-law claim is "the same" as the Illinois claim this Court held not to be preempted in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *See* Opp. at 7, 8, 9 & 11 n. 10. In stressing this aspect of the Missouri Supreme Court's analysis, and the particular test of §301 preemption necessarily entailed therein, Respondent's Brief confirms and concedes that the issues framed in the Petition are indeed well-presented by this case.

Respondent's own characterization of the opinion below correctly zeroes in on the troubling aspect of this case. The

opinion applies a test of preemption which looks only to the underlying state *law* and concludes that the *law* is by nature "independent" of the CBA and therefore not subject to preemption. The opinion reasons that "the analysis in *Lingle* applies with equal force to Missouri's workers' compensation *statute*" (Petition Appendix A-5, emphasis added), that "*like the Illinois statute* at issue in *Lingle*, *§287.780* created a judicially cognizable *independent* tort" (A-5, emphasis added), and, therefore, this case falls within the "exception to the reach of federal preemption" "the United States Supreme Court recognized [in *Lingle* for] workers' compensation cases" (A-4). Strictly based on a comparison of the two states' *laws*, the Missouri high court thus concluded that respondent's claim was "independent" of the CBA and therefore not preempted. The court so ruled even though its opinion also specifically acknowledges that petitioner Hussmann's defense in this case is that "[respondent] was terminated for insubordination for failing to disclose pre-employment injuries and back problems in her employment application, *in violation of plant rules*[1] *and the labor agreement*" (A-2, emphasis added; *see also* A-9).[2]

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[1]Hussmann's "Plant Rules" are also incorporated into the CBA. *See* CBA Article 4 ¶J (L.F. 41); *see also* Article 8 §1 (L.F. 45).

[2] Hussmann's CBA defenses were established in the record by means of the Halpern affidavit supporting summary judgment. The affidavit, competently based on business records, states in pertinent part:

> [Respondent] was terminated by Hussmann on September 4, 1990 for violations of Plant Rule 1 (falsification of application or other company records), Plant Rule 20 (insubordination) and Article 9 §4 ¶I of the aforesaid collective bargaining agreement (falsification or omission of relevant information on employment application), in that a worker's compensation claim recently filed by [respondent] against the Second Injury Fund claimed pre-employment injuries and back problems which [respondent] had denied having on written employment applica-

(Footnote 2 continued next page)

Manifestly, as Respondent's Brief impliedly concedes, the first two Questions Presented set out in the Petition are properly raised by the opinion below. These questions pose fundamental unresolved issues concerning the proper test courts should apply in determining §301 preemption. Specifically, using Respondent's terminology, should the test for preemption focus exclusively on the "elements" of the state-law tort claim and inquire whether those elements, considered in the abstract, are of such a nature as to render the claim "independent" of the CBA for §301 purposes — the test employed in the opinion below? Or should the test require an analysis not just of the legal "elements," but also of the particular facts and allegations in the case, including those raised by the defendant's defenses, and inquire whether the fact-finder will need to interpret or analyze any CBA provisions in resolving the merits of the claim, as petitioner contends and other courts have held (*see* authorities cited in the Petition at 20 n. 22)? These are the key competing tests that have confused and split the courts. This case, respondent's own analysis confirms, presents them well.

(Footnote 2 continued)

> tion forms submitted by her to Hussmann in 1987, and, when directed by Hussmann supervisory personnel to answer questions concerning the apparent false statements in her employment application forms, she refused to answer any questions.

L.F. at 35-6. The entire CBA is also in evidence in the record below (*see* L.F. at 35 & 37-69). Respondent's contention that Hussmann's CBA defenses were not properly in the record before the Missouri Supreme Court because Hussmann had not yet filed its answer (Opp. at 7 & 11 n. 11) is therefore without merit. Hussmann's CBA defenses were in the record by virtue of the summary judgment affidavit and are also specifically alluded to in both appellate court opinions below (*see* A-2 & A-9). A motion for summary judgment is a typical procedural device by which §301 preemption objections may properly be asserted and preserved for review. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 206 (1985) (sustaining §301 preemption objection raised by motion for summary judgment and supporting affidavits filed in state court).

Under the test espoused by respondent and the court below, workers' compensation claims are virtually immunized from §301 preemption. Under their test, preemption could occur only if an element of the tort claim as defined by state law contained a specific reference to collective bargaining agreements — an unlikely prospect. Given the unlikelihood that a state-law "element" would itself require construction of provisions in the labor agreement, such claims, under this view, would effectively comprise an "exception to the reach of federal preemption," as the opinion below acknowledges (A-4).

Respondent is unable to explain why workers' compensation retaliation cases should be immunized from federal preemption in this fashion. She suggests, quoting the Missouri Supreme Court's opinion, that the right to assert such claims "cannot be bargained away." Opp. at 12; Petition A-6. But this Court in *Lingle* specifically stated that the fact that a right to be free from retaliatory discharge may be "non-negotiable" under state law is irrelevant to preemption analysis:

> [A] State could create a remedy that, although non-negotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be preempted by §301.

Lingle, 486 U.S. at 407 n. 7. The assertion that retaliation claims are "non-negotiable" and cannot be "bargained away," even if true, therefore cannot be used to justify the urged *absolute* "exception to federal preemption." The foregoing excerpt clearly indicates that such claims may well, in their "*application*," require CBA "interpretation" and therefore "be preempted."[3]

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[3]Respondent also cites the "cannot-be-bargained-away" language from the opinion below in support of the opinion's further express holding that

(Footnote 3 continued next page)

Respondent further asserts, as does the opinion below, that it is the "motive" element of retaliation claims which, due to its "purely factual" character, immunizes such claims from §301 preemption. *See* Opp. at 11; Petition A-4 to A-5. In response to the numerous cases which hold to the contrary — sustaining §301 preemption where the employer invokes CBA provisions defensively to explain its actions and "motives" (Petition at 20 n. 22) — respondent dismisses these cases as not involving workers' compensation retaliation claims. Opp. at 10-11. But this begs the question. Again, why is it that workers' compensation retaliation claims are insulated from federal preemption when other types of state-law claims would be preempted under analytically identical circumstances? Respondent, the court below and other post-*Lingle* cases in accord therewith offer no answer to this question, other than to parrot conclusory phrases from *Lingle* which are inapposite by virtue of the final and binding arbitrator's award in that case.[4] *See* Petition at 12-13, 15 n. 15 & 17-18 n. 18.

(Footnote 3 continued)
there was no "waiver" in this case. *See* Opp. at 12; Petition A-6. With respect to the "waiver" issue (the Petition's third Question Presented), the "clear and unmistakable" evidence of waiver in this case consists of the specific CBA provisions which authorized Hussmann's conduct and which directly conflict with respondent's asserted state-law rights. *See* Petition at 21-22. To the extent respondent and the decision below would require extrinsic or parol "evidence" of waiver beyond the four corners of the CBA, this urged dubious requirement only further fortifies petitioner's contention that there is a need for this Court to speak to and clarify the concept of "waiver" in this important labor context.

[4]Respondent's statement that this Court "reversed" a finding of preemption in a companion case to *Lingle* where, as here, the plaintiff-employee never invoked the grievance/arbitration procedure (Opp. at 9 n. 9), is incorrect. In that case the Court merely "vacated and . . . remanded . . . for further consideration in light of *Lingle*" without rendering any decision on the merits. *See Martin v. Carling National Breweries, Inc.*, 486 U.S. 1049 (1988).

If, as petitioner contends, the case below and others in accord therewith[5] have all misread *Lingle* and have missed the point of the contract-interpretation test *Lingle* reaffirms, the error is no small one. Contrary to Respondent's urgings, the problem is not simply limited to one particular type of state-law claim involving workers' compensation, nor is it limited just to one line of cases gone awry. The error, rather, is symptomatic of the far-ranging, fundamental and well-documented confusion and disarray, in both the state and lower federal courts, as to what *Lingle* really means and what the proper test of §301 preemption really is. *See* Petition at 13-14. Is it, as held below, the nature of the claim *per se* and its legal "elements" that determine "independence" for §301 purposes, which means that entire classes of claims (workers' compensation retaliation being only one example) will always be exempted from the reach of federal labor preemption irrespective of CBA defenses? If so, what exactly is it in the "elements" that immunizes such claims from preemption, given that "non-negotiability" is not a factor. *See Lingle*, 486 U.S. 407 n. 7. Or, instead, is it the specific allegations in the case (including those raised by defendant's defenses) the fact-finder will need to resolve which control in deciding whether CBA interpretation is sufficiently implicated to trigger §301 preemption, which means that preemption must be decided "on a case-by-case basis"? *See Lueck*, 471 U.S. at 220. The decisions are split and confused on these most basic questions. Five years after *Lingle* the confusion and disarray are increasing, not decreasing. *See* Petition at 13-14.

[5] With one exception, the post-*Lingle* cases are in lock-step in finding that workers' compensation retaliation claims are not preempted by §301. *See* Petition at 15 n. 15. Contrary to respondent's contention (Opp. at 10), *Nash v. AT&T Nassau Metals, Inc.*, 381 S.E.2d 206 (S.C. 1989), the one exception finding preemption, clearly did involve a claim by an employee who alleged he was wrongfully terminated because he had filed a "*workers' compensation claim*" and had rejected the employer's proposed settlement of the claim which required him to resign. *See id.* at 207 (emphasis added).

If the Court is of a mind to foray again into the field of §301 preemption — and to address head-on the now better-defined but more divergently answered questions in this important area of law — this is the case by which to do it. Granting certiorari and finding preemption in another workers' compensation retaliation case would be the most effective way to correct any widespread misreading of *Lingle* and to drive home the point — increasingly missed by the state and lower federal courts — that it is the jury's attempt to interpret and analyze CBA provisions (whether injected into the case by plaintiff or defendant) in resolving the state-law claim, not the nature or "elements" of the claim considered in the abstract, which undercuts the central role played by labor arbitrators and otherwise implicates the vital federal labor policies underlying the doctrine of §301 preemption.

Respectfully submitted,

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